

BRB No. 92-0763

VICTOR M. QUIROZ)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	DATE ISSUED:
CORPORATION)	
)	
and)	
)	
AETNA CASUALTY AND SURETY)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Donald M. Pekich (Cantrell, Green, Pekich & Cruz), Long Beach, California, for claimant.

Enrique M. Vassallo (Mullen & Filippi), Long Beach, California, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-2189) of Administrative Law Judge Daniel L. Stewart rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury in the course his employment with Todd Pacific Shipyards on May 9, 1984. As a result of this incident, claimant was diagnosed with a left inguinal hernia by Dr. Hollingshead, who subsequently performed hernia surgery on May 10, 1984. Claimant returned to his usual and customary duties as a pipefitter on June 25, 1984.

On August 30, 1984 claimant was involved in an automobile accident. Dr. Lowd diagnosed claimant's condition as myofascial strain of the cervical and lumbosacral spines and prescribed a regimen of physical therapy treatments. Claimant continued to perform his full duties as a pipefitter but noted recurrent increases in low back pain causing him to miss several weeks of work in September and October of 1986. On September 12, 1986, Dr. Delman placed claimant on light work duty for sixteen months. In January 1988, employer noted that it did not have permanent light duty positions. In light of that fact, claimant was terminated in February 1988, for "failure to meet physical standards." Claimant was subsequently found to be totally and permanently disabled on November 16, 1988, by Dr. Latteri, who has treated claimant since July 18, 1986.

Employer voluntarily paid temporary total disability benefits to claimant totalling \$59,182.92, for various time periods between May 10, 1984 through October 7, 1990. Upon the termination of his benefits, claimant filed a claim for reinstatement of compensation.

In his Decision and Order, the administrative law judge denied benefits under the Act¹ and ordered claimant to reimburse employer \$56,584.76 for its overpayment of temporary total disability benefits paid following claimant's August 30, 1984 automobile accident. On appeal, claimant challenges the administrative law judge's determination that employer is entitled to reimbursement for its overpayment. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge did not have jurisdiction to order repayment of the disability benefits received after August 30, 1984. In support of his contention claimant cites the decision of the United States Court of Appeals for the Ninth Circuit in *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992).

¹In denying benefits, the administrative law judge found that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption of causation, but that employer rebutted this presumption. The administrative law judge then found, after evaluating the record as a whole, that claimant's low back condition, notably his lumbosacral spine injury, stems from his 1984 automobile accident, and thus, did not arise out of or in the course of his employment.

In considering the reimbursement issue, the administrative law judge first acknowledged the Board's holding that reimbursement is available "only if unpaid installments of compensation remain owing." *Cooper v. Ceres Gulf*, 24 BRBS 33 (1990); 33 U.S.C. §914(j). The administrative law judge, however, declined to follow the Board's decision² and instead applied the holdings of two district court decisions, *Ceres Gulf v. Cooper*, No. H-90-1722, 24 BRBS 56 (CRT)(S.D. Tex. 1990), and *Stevedoring Services of America v. Eggert*, No. CV-89-172, 23 BRBS 25 (CRT)(W.D. Wash. 1989), to find Section 14(j) inapplicable to the instant case.³ In light of this finding, the administrative law judge concluded that employer was entitled to reimbursement for \$56,584.76 in temporary total disability benefits paid claimant after his August 30, 1984, automobile accident.

Subsequent to the administrative law judge's decision, the United States Courts of Appeals for the Fifth and Ninth Circuits issued decisions in *Cooper* and *Eggert*, wherein both courts rejected claims by employers for recoupment under the Act.⁴ See *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992); *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992); see also *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). Specifically, the Ninth Circuit held that the Act provides only for a credit of excess payments against unpaid compensation due. See *Eggert*, 953 F.2d at 556-557, 25 BRBS at 97-99 (CRT); 33 U.S.C. §§908(j), 914(j), 922. The court stated that although the possibility of a state common law claim for recovery was not before it, by providing only for a credit against unpaid compensation, Congress expressed an intent to preclude actions for repayment. *Eggert*, 953 F.2d at 557, 25 BRBS at 100 (CRT). Additionally, the Fifth Circuit held that the Act preempts any asserted common law right by an employer to recoup overpayments under the general federal question statute, 28 U.S.C. §1331. *Cooper*, 957 F.2d at 1208, 25 BRBS at 133 (CRT).

²In explaining his rationale, the administrative law judge found that the benevolence of the Act was not intended to reward those who file frivolous suits, which the administrative law judge believed was the effect of the Board's position in *Cooper v. Ceres Gulf*, 24 BRBS 33 (1990).

³Section 14(j) states:

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

⁴The administrative law judge did note in his Decision and Order that the district court's decision in *Eggert* was on appeal to the United States Court of Appeals for the Ninth Circuit. Additionally, the administrative law judge commented that inasmuch as appellate jurisdiction for this case rests with the United States Court of Appeals for the Ninth Circuit, he would follow the Ninth Circuit's interpretation of the Act, upon the announcement of that court's decision in *Eggert*.

In its response brief, employer asserts that the decision in *Eggert* is distinguishable from the instant case, and thus, is inapplicable. Employer maintains that the *Eggert* decision does not address the present scenario wherein a claimant received benefits which were later determined to have been wrongfully paid due to the claimant's deception. Furthermore, employer argues that it would be contrary to public policy and the policy of the Act to apply *Eggert* to this scenario since this would reward fraud and deceit. In support of its contention, employer cites the district court decision in *Cooper*. Employer's contentions lack merit. First, the underpinning of employer's contention, notably the position taken by the district court in *Cooper*, has been explicitly rejected, on appeal, by the United States Court of Appeals for the Fifth Circuit. *Cooper*, 957 F.2d at 1199, 25 BRBS at 125 (CRT). In its decision, the Fifth Circuit, noting its agreement with the Ninth Circuit, held that the Act does not vest jurisdiction in the district court for an employer's action to recover compensation *wrongfully received*. *Id.*, 957 F.2d at 1207, 25 BRBS at 132 (CRT)(emphasis added). Additionally, contrary to employer's contention, the scenario in *Eggert* is analogous to the instant case in that in both instances the administrative law judge found that the claimant's disability was due to an intervening cause post-dating the work injury. *Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT). Moreover, it cannot be said that claimant pursued his claim solely on the basis of fraud and/or deceit. In discussing the applicability of Section 26 in this case, the administrative law judge determined that claimant and his counsel had some reasonable basis to pursue this case, despite the automobile accidents. Decision and Order at 43.

As it is well-settled that an employer may not recover under the Act any overpayment of compensation directly from a claimant, we hold that the administrative law judge erred in finding that employer is entitled to reimbursement from claimant for overpaid temporary total disability benefits. See *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993); *Vitola v. Navy Resale and Services Support Office*, 26 BRBS 88 (1992); see generally *Cooper*, 24 BRBS at 34. Consequently, we reverse the administrative law judge's finding that employer is entitled to reimbursement for \$56,584.76 in temporary total disability benefits paid claimant after his August 30, 1984 automobile accident. Moreover, since claimant has not raised any contentions regarding the administrative law judge's determination that claimant's low back condition did not arise out of or in the course of his employment, the administrative law judge's denial of benefits is affirmed.

Accordingly, the administrative law judge's finding that employer is entitled to a reimbursement of an overpayment is reversed. In all other respects the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge